No. 12,722

IN THE

United States Court of Appeals

For the Ninth Circuit

California Motor Transport Co., Ltd. (a corporation), et al.,

Appellants,

vs.

The Fidelity and Casualty Company of New York (a corporation), and Bayly, Martin & Fay, Inc. of California (a corporation),

Appellees.

Upon Appeal from the United States District Court of the Northern District of California, Southern Division.

APPELLANTS' REPLY TO
BRIEF OF APPELLEE, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
and
BRIEF OF APPELLEE, BAYLY, MARTIN & FAY, INC., OF CALIFORNIA.

Norman A. Eisner,
Mills Building, San Francisco 4, California,
Attorney for Appellants.

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REPLY TO BRIEF OF APPELLEE, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

Appellee's brief clouds the issue but does not meet it. It avoids directly and clearly answering the points made by appellants. This action is for a fixed and guaranteed rate of premium. It stands or falls on the basis and theory that Policies SPL-20968 and 20950 were offered for acceptance and accepted as flat or guaranteed premium rate policies. It is conceded, as indeed it must be, that there had to be an offer and

acceptance of these policies and that the offer and acceptance had to conform.

Appellants in the opening brief maintained that neither of the essential elements of a contract was present; that the policies were never offered for acceptance as flat or guaranteed rate policies, but were only offered in conjunction with a retrospective agreement; that appellants did not accept the offer as made by appellee, never had the privilege of accepting and never accepted policies bearing a $2.20 guaranteed rate of premium.

Appellee insurance company had a right to decline to write insurance for appellants except on specified terms and appellants had the corresponding right to accept or reject those terms. In the opening brief appellants set forth in detail what they claim and claimed to be conclusive evidence that these policies were never independently offered and were never open for acceptance as guaranteed premium rate policies. Appellee has completely failed to answer the argument. We shall demonstrate this by a brief reference to the points made.

THE INSTRUMENTS.

We first referred to the instruments themselves. The policies and the retrospective agreement bear the same date. They refer one to the other. They were simultaneously delivered to Bayly, Martin & Fay. The retrospective agreement recites specifically that ap-

pellee insurance company is *"about to issue"* Policy SPL-20968 *"upon the security of this agreement."* It further recites that the company *"has proposed the adoption by agreement of the Retrospective Rating Plan hereinafter set forth in modification of the premium provisions of the said policy, and such proposal having been accepted by the insured."*

We ask how it is possible to contend that Policy SPL-20968, the primary policy, was offered for acceptance independently of the acceptance of the Retrospective Rating Plan. We look in vain for any answer to this question in appellee's brief.

As we understand appellee's position, which is by no means clear, it is that when the policies were delivered to Bayly, Martin & Fay, approximately October 1st or 2nd, 1946, the policies were thereupon issued and became immediately effective. This would mean that the policies were offered for acceptance by the insurer on a guaranteed premium basis, a flat $2.20 rate, and that they were accepted on that basis.

The instruments on their face show that such was not the fact. Let us assume that Policy SPL-20968 covered a risk that was not covered by the former policy. Let us assume that after delivery to Bayly, Martin & Fay a loss was suffered by appellants of this particular added nature. Let us further assume that appellants had sought to hold appellee liable on the theory that when Policy SPL-20968 was delivered to Bayly, Martin & Fay in conjunction with the retrospective agreement it thereupon became an issued and

binding policy upon appellee, without acceptance by appellants of the Retrospective Rating Plan. Such a contention or claim upon the part of appellants in the face of the documents themselves would have been deemed preposterous. The answer would have been obvious. The documents show upon their face that these policies were only to be effective if the agreement covering the Retrospective Rating Plan was accepted in modification of the rate set forth in the policy. Yet, appellee has no more basis to collect premiums upon the policies in this action on the theory that they were in effect, than appellants would have had to recover in the hypothetical case set forth.

THE TESTIMONY DISCLOSES THAT THE POLICIES WERE ONLY OFFERED IN CONJUNCTION WITH THE RETROSPECTIVE AGREEMENT AND NOT ON A GUARANTEED BASIS.

On pages 13 et seq., of the opening brief, appellants set forth testimony showing that appellee positively refused to write this insurance on a guaranteed rate basis. It positively refused to offer a $2.20 guaranteed rate. The New York office was insistent upon a Retrospective Rating Plan. Cantlen tried in vain to obtain a guaranteed quotation from appellee.

What answer does appellee make? Can appellee point to anything that would support a finding that appellee was willing to write the insurance on a guaranteed rate of $2.20? Absolutely not. If not, then clearly these policies were not offered or open to acceptance on such a basis.

According to appellee, when the policies were delivered to Bayly, Martin & Fay, the insurance was thereupon renewed. According to appellee, a binder having been issued pending renewal, as soon as these policies were physically delivered to Bayly, Martin & Fay the renewal was effected and the binder was supplanted. According to appellee, the execution of the retrospective agreement was optional with the insured. How then does appellee explain the letter of C. L. Anderson, Resident Manager (Ex. RR) written on December 11, 1947, clearly showing that so far as appellee was concerned the renewal had not been consummated or effected and that it could only be consummated by execution of the retrospective agreement, a condition that had been adamantly insisted upon? We look in vain in appellee's brief for any mention or explanation.

All of the testimony, without exception, is to the effect that the execution of the agreement embodying the Retrospective Rating Plan was a condition that was adamantly insisted upon by appellee throughout the negotiations and throughout the period that the policies are claimed to have been in effect, and that insurance was never offered by appellee on any other basis.

We would also call attention to the following statement in the brief of Bayly, Martin & Fay. (p. 6.)

> "Immediately after receiving the policies and the retrospective agreement from the plaintiff Cantlen went to see Coughlin taking with him

the proposed retrospective agreement but not taking the policies because Bayly, Martin & Fay did not consider the issuance of the policies a completed transaction because of the insistence of plaintiff that the retrospective agreement be signed; the policies were finally physically delivered to the defendants on or about October 27, 1947, at which time Cantlen was still arguing with the plaintiff that they should not charge the $2.00 standard rate (Plaintiff's Exhibit 18)."

THERE WAS NO ACCEPTANCE OF THE POLICIES.

We know that the Retrospective Rating Plan was refused. The agreement was not signed. The only offer that appellee ever made concerning these policies was rejected. Unless these policies were offered for acceptance on a guaranteed premium basis and independently of the retrospective agreement, and unless an offer of that character was accepted, it is just impossible for these policies to have become effective. If there was an offer of these policies independently of execution of the retrospective agreement, we ask appellee to point to anything whatsoever in this record to indicate it. Cantlen was continuously trying to get appellee to quote a flat or guaranteed rate of premium upon which it would write the insurance, and appellee consistently refused to do so. Yet, according to the position of appellee, policies on a guaranteed premium basis had been both issued and accepted.

Appellee has not answered and cannot answer these questions in a manner consistent with the judgment in this case:

1. Did appellee ever offer insurance to appellants on a $2.20 guaranteed basis?

2. Were Policies SPL-20968 and 20950 ever offered for acceptance on any basis other than in conjunction with the execution of a retrospective agreement embodying a Retrospective Rating Plan?

3. The retrospective agreement and Retrospective Rating Plan having been rejected, when and how could the policies ever have become effective?

It is respectfully submitted that appellee does not and cannot answer these questions. The evidence and testimony are undisputed

1. That appellee never offered insurance on a $2.20 guaranteed or any other guaranteed basis.

2. The policies were only offered in conjunction with the retrospective agreement embodying the Retrospective Rating Plan.

3. The offer made was never accepted.

THE INCONSISTENT CONDUCT.

Appellants, in their opening brief, have pointed out in detail the repeated instances of conduct on the part of appellee and Bayly, Martin & Fay wholly inconsistent with the effectiveness of these policies. The only explanation of appellee is that there was to be a final audit. According to appellee, the insured could pay any rate of premium, however erroneous, the payments made would be accepted without protest and the company would depend on discovering the error on final audit. The final audit, in the case of policies bearing a flat or guaranteed rate of premium, such as these policies are asserted to have borne, is nothing more than a final check to ascertain that the premium has been paid on all gross receipts. The final audit has absolutely nothing to do with the rate of premium. The idea that premiums at the rate of the former policy should have been repeatedly received and processed, broken down, by Bayly, Martin & Fay, the agent of the insurance carrier for the collection of the premiums, and in turn accepted and approved by the insurance carrier itself, when, according to appellee, policies bearing a rate of premium almost double that received had been in effect from September 1, 1946, is just incredible. The fact that there was to be a final audit, as is true in the case of all policies in which the rate is to be applied to gross receipts, is neither an answer nor explanation.

APPELLEE'S STATEMENT OF THE CASE.

We regret to be compelled to state that appellee's statements and recitals are in many instances confusing and inaccurate.

Appellants in their opening brief (pp. 33-37) demonstrated that the filing of Policy Number SPL-20968 with the Interstate Commerce Commission and Public Utilities Commission on August 27, 1946, has no bearing on this case; that such a filing is made as a matter of course when a binder is issued; the coverage is arbitrarily given a number, and if and when a policy is issued it will be given that number. Appellee does not answer or challenge any of the statements therein made. It makes allegations, however, that unless noted are exceedingly misleading. For example, at the end of the second paragraph on page 2 appellee states:

> "At the same time (when the binder was issued), and at appellants' agent's request, appellee made the required legal filing with the Railroad Commission and I.C.C. stating appellants were covered with the new primary Policy No. SPL-20968, so that they could continue their motor transport business uninterrupted."

The implication is that the registration of the coverage under No. SPL-20968 was a registration of the particular primary policy of that number for which the premium is now claimed. The fact, of course, is that the number was listed because of the issuance of the binder and had reference to no particular policy.

The intent was that if a policy should be issued and accepted it would be given that number.

In the immediately following paragraph (p. 2) appellee states that "in the latter part of September, 1946, appellee wrote up and delivered to the agent two new policies, effective from September 1, 1946, which, accordingly, superseded the binder." The only wholly true statement in the foregoing sentence is that appellee wrote up and delivered to the agent two new policies. Appellee fails to state that there was jointly delivered with the policies a retrospective rating agreement. The statement that the policies were effective from September 1, 1946, is misleading and begs the question. The new policies could only become effective if the condition upon which they were offered was complied with and accepted—the signing of the retrospective agreement. Appellee then adds (just as if a matter of course) that these policies "accordingly superseded the binder." The policies could and would only supersede the binder if they became effective by offer and acceptance on the same terms.

The very next sentence is "the agent knew that the new insurance, evidenced by both the primary Policy SPL-20968 and the excess Policy SPL-20950, together called for payment of a total premium at the rate of $2.20 per $100.00 of gross earnings subject to final audit." Of course, the agent knew the rate set forth in these policies. It also knew that the rate set forth in these policies was modified by a collateral agree-

ment simultaneously submitted. The words "subject to final premium audit" are misleading. All policies with the premium rate based on gross earnings are subject to final audit to determine whether gross earnings have been correctly reported. If the rate of premium is a guaranteed or flat rate, it is applied throughout, but if the premium is modified by a Retrospective Rating Plan, fluctuating with loss experience, then only will the rate to be applied depend on loss experience indicated on final audit.

We call particular attention to the next thoroughly untrue and misleading statement:

> "At the same time a proposed retrospective agreement, which, even if signed, had no effect on insurance except as to the rate applicable to the final premium audit at the end of the policy period, was delivered to appellants with the option of signing the same or subjecting the new policies to cancellation should appellee elect so to do."

The statement is aggravatingly false. Appellants had no option of signing the retrospective agreement. The retrospective agreement had to be signed or there would be no agreement. The effect of signing the agreement was to make the rate of premium dependent on loss experience. Appellee would consider renewing the insurance on no other basis. The amount of premium would of course have to be determined at the end of the policy period, for it would then be that the loss experience would be known. The suggestion that the policies were offered and accepted on a

flat or guaranteed basis, and that the execution of the retrospective agreement was optional, is wholly contrary to the instruments themselves and all of the evidence.

The next sentence indicates that appellee cancelled these particular policies. Appellee cancelled the coverage that since the issuance of the binder had been identified by Policy Number SPL-20968. This was the number that was registered when the binder was issued, and necessarily when the coverage was cancelled the reference was to the same number. The reference does not signify or indicate that any policy bearing that number had ever actually become effective, by issuance and acceptance.

On page 24 of its brief appellee again makes a deceptive and misleading statement:

> "It should be noted in passing that the parties understood that no cancellation notice of the binder had been necessary since it had been superseded by the policies which were issued effective September 1, 1946."

Let us consider this statement in the light of the undisputed facts. The implication is unmistakable that if the policies had not been "issued" concellation notice of the binder (by that description) would have been forwarded to the Commissions. This implication could not be further from the truth. When the binder was issued it was necessary to assign an arbitrary policy number for the purpose of the filings before the Commissions. The Commissions would not accept the registration or filing of the binder alone.

The testimony of Mettalia conclusively establishes this.

> "When binders are issued we automatically add these assigned policy numbers to satisfy the ICC and Railroad Commission. *They do not accept them otherwise.*" (Tr. p. 120.)

Since it was necessary to assign a number for the purpose of the filings, it was likewise necessary to refer to that same number in the event of cancellation. It would have been just impossible to have given cancellation notice in any other manner. The above statement of appellee and its implications are totally erroneous and misleading.

Appellee next refers to the final audit of gross earnings made in April, 1947. It is intimated that Davis, when certifying to the correctness of the figures, did so upon a paper upon which the policy number appeared and a notation as to the premium rate. Appellants have fully covered this phase in their opening brief. (pp. 43-44.) Mr. Challburg testified that the only thing he showed Mr. Davis was the amount of gross receipts for his approval, and that there was nothing else on the document at the time it was shown to Mr. Davis. Mr. Davis testified that all he looked at and checked were the figures, but in perfect honesty testified that he could not at the date of testifying remember whether there was or was not anything on the paper in addition to the figures.

Appellee next states that after final audit it rendered a bill to appellants. It neglects to state that it

rendered a bill to Bayly, Martin & Fay and that Bayly, Martin & Fay disputed the bill and contended that appellee had no right to charge the $2.20 rate of premium. It neglects to state that Bayly, Martin & Fay did not send a bill to appellants; that it was not until October 27, 1947 that a bill was presented to appellants. Appellee neglects to state that at the time of delivering the bill to appellants Cantlen dictated a letter for appellants to sign denying liability. This is a highly significant letter and it is not mentioned by appellee. If these policies were in effect on a guaranteed basis, then why did Cantlen contend that there was no basis for a charge and why did he cause appellants to write to Bayly, Martin & Fay as follows:

> "During the aforementioned period, namely, from September 1, 1946 to January 21, 1947, we attempted through you to negotiate a renewal arrangement with the Fidelity Insurance Company, but in view of the arrangements which were offered to us we found it inadvisable to continue with this company. At no time did we agree to a rate of $2.20 as against our former rate of $1.223."

It will be recalled that Cantlen testified that the statements in the foregoing letter and dictated by him were true. (Tr. pp. 278-279.)

The next statement of appellee (p. 4) is that appellants "reported a total of ninety-eight claims to appellee for handling under the two policies which appellee had issued." This statement is just a half truth. Appellants reported the claims after Septem-

ber 1, 1946, but not under these policies. Appellants were covered by insurance and paid premiums. They certainly would report claims, but there is no basis for the assertion that the claims were reported under these policies. (Tr. pp. 121-122.) For all claims, including all suits based on claims, arising between September 1, 1946 and January 21, 1947, appellee paid out, including attorneys' fees, a total of $7800.00, and collected from appellants in premiums $9132.12.

Finally, appellee states that a law suit filed on a claim arising between September 1, 1946 and January 21, 1947, was submitted to appellee after October 22, 1947. Again it is recited that the reference was under these policies. Of course, appellants would refer to appellee any actions on claims arising during the period for which they had paid premiums in the sum of $9131.12. Likewise, appellee was bound to defend the actions notwithstanding appellants' refusal to pay additional premiums.

APPELLEE'S REVIEW OF THE EVIDENCE.

Appellee's review of the evidence to support the judgment is literally filled with statements and misstatements that are calculated to divert attention from the real issues in this case. Assumptions are indulged in that beg the issue. It is impossible to take up each sentence and expose its falsity and deceptiveness, but we shall consider a number in order to illustrate what permeates the entire narrative.

The issue in this case is whether or not these policies were effective from September 1, 1946 to January 21, 1947, for only if they were in effect can premiums be due under them. The words "issue" and "issued" are repeatedly used by appellee. The words are repeatedly used in a sense connoting the preparation and physical delivery of a policy to Bayly, Martin & Fay. No one disputes that the policies were written and delivered to Bayly, Martin & Fay. However, they were written and delivered in conjunction with a retrospective agreement. The words "issue" and "issued" ordinarily refer to policies that have become effective by delivery and acceptance, and both these essential factors are absent in this case.

If appellee had an answer to the salient questions in this case, it would have considered the arguments presented in appellants' opening brief, instead of attempting to evade and confuse the issues.

The first question is whether these policies were offered for acceptance by appellee independently of the retrospective agreement; whether they were open for acceptance independently of a Retrospective Rating Plan embodied in the agreement and on a flat or guaranteed basis. The second question is whether, if the policies were offered for acceptance on such a basis, they were accepted by appellants. Appellants' opening brief adheres strictly to a consideration of these questions.

Can appellee explain how these policies were open for acceptance on a flat or guaranteed basis in the

face of the provisions in the agreement and the circumstances of their joint delivery? Can appellee answer the definite testimony that appellee's home office would only consider writing this insurance on a retrospective basis; that a guaranteed rate would not be quoted, that the rate of $2.20 would not have been considered as a guaranteed rate of premium? Can appellee point to any evidence whatsoever that the condition and ultimatum of execution of the retrospective agreement was ever withdrawn? Can appellee point to any evidence that appellants ever agreed to accept policies with a $2.20 rate of premium?

Here are unanswerable facts. They are coupled with conduct on the part of appellee utterly inconsistent with an intent or understanding that these policies or a $2.20 rate of premium were effective. Bayly, Martin & Fay was an experienced broker. Can appellee explain how it was that Bayly, Martin & Fay submitted the retrospective agreement to appellants and held the policies until October 22, 1947 because the policies were only offered for acceptance in conjunction with the agreement?[1] Can appellee explain the contention made by Bayly, Martin & Fay that appellee was not entitled to charge the $2.20 rate because the policies were never offered on such a

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[1]The brief of appellee, Bayly, Martin & Fay, seeks to justify its conduct on the ground that the Fidelity issued its ultimatum that the "policies would have to issue on a retrospective plan basis", and Bayly, Martin & Fay did not consider the issuance of the policies a completed transaction because of the insistence of plaintiff that the retrospective agreement be signed.

basis and the insured had never agreed to pay such a rate?

These are the questions and they are not answered. Instead, appellee, in addition to repeatedly asseverating that the policies were issued (in the sense of having been written and delivered), makes the following contentions:

1. The policy number was listed with the Commissions at the time the binder was issued. It is contended that the listing of the policy number when the binder was issued is evidence that these particular policies were issued and accepted. The lack of significance of such listing at the time of issuance of the binder is covered in appellants' opening brief and the facts therein stated are not challenged.

2. Appellants knew that they had to be covered by insurance and therefore must have accepted these policies. The undisputed evidence that the policies were not offered for acceptance except on a retrospective basis is ignored. Of course, appellants knew they had to be covered by insurance pending negotiations for renewal. A binder was issued for that purpose. They were advised that the binder delivered to them would constitute their policy, their evidence of coverage pending negotiations for renewal. They paid premiums throughout the period here involved on the assumption that the rate of premium of the expired policy was applicable. They received no other policy than the binder. The binder recited that it was for sixty days. Let us assume that the retrospective agree-

ment and policies had not been delivered to Bayly, Martin & Fay; and further assume that a loss had occurred after the expiration of the sixty days mentioned in the binder, and that appellee had refused to recognize liability on the ground that the coverage had expired at the expiration of the sixty days set forth in the binder. In the light of continued payment and acceptance of premiums at the rate of the former policy, conduct of insurer and insured following the sixty days identical with that during the sixty day period, and the continuation of negotiations for the renewal of insurance, no Court in the land would release appellee from liability. Beyond any queston, a Court would hold that the binder had been extended by implication, or that the coverage of the former policy had been extended by implied agreement. Appellee cannot prove either offer or acceptance of these policies by the fact that the binder was for sixty days and appellants required insurance coverage.

3. Appellants presented claims for losses suffered between September 1, 1946 and January 21, 1947. Certainly appellants presented claims. They had paid premiums and appellee had accepted premiums, and it would have been anomalous if appellants did not present claims and equally anomalous if appellee had refused to accept responsibility for the claims. The conduct shows a recognition by both parties of the existence of coverage, but not of coverage under these policies.

The evidence that these policies were not offered or accepted on a guaranteed basis, that they never became effective is direct and uncontradicted. The circumstances relied upon by appellee are not inconsistent with the direct and uncontradicted evidence and do not tend to prove the contrary.

Faced with evidence that cannot be answered or explained away, appellee argues that in some mysterious manner appellants were given the right to accept the policies independently of the retrospective agreement, and that the execution of the retrospective agreement was optional. In the face of the undisputed facts and circumstances there is no basis for such a contention. The documents show and the undisputed testimony demonstrates that the execution of the retrospective agreement was a positive demand, an ultimatum, never relaxed, continuously and adamantly adhered to. There just wasn't any option.

To demonstrate the manner in which appellee adroitly seeks to evade and confuse the issue, we shall consider a number of the statements made. Consideration of each such statement would require the brief to be unduly prolix. It requires much less space to make an evasive or illogical statement than to analyze and expose it.

At the outset (p. 6) appellee misstates the issue. It states:

> "Since it is undisputed that appellee covered appellants with insurance, there is no issue as to the existence of *the contract* between the parties.

> The issue is whether appellants should pay appellee on a final audit premium balance of $7841.99 computed at the rate of $2.20 for $100.00 of appellants' gross earnings in the manner set forth in two new insurance policies which *were effective* from September 1, 1946 to January 21, 1947, or whether, having voluntarily paid appellee $9131.12 computed at the rate of $1.223 for $100.00 as set forth in an old policy which had expired September 1, 1946, appellants owe nothing more to appellee."

There certainly is an issue as to the existence of "the contract", if by these words appellee refers to the policies in question. The issue is not whether appellants owe more premiums, on the assumption that Policies SPL-20968 and SPL-20950 were effective from September 1, 1946 to January 21, 1947, but whether or not these policies were in effect during that period. The $9131.12 was not paid as a voluntary payment on account, but as full premium for the coverage that was temporarily effective pending negotiations for the issuance of renewal policies.

Appellee (pp. 7-8) states that the insurance was undertaken in 1941 with the understanding that the premium rate would be adjusted annually. The rate could be adjusted annually, but this does not mean that appellants would not have to agree to and accept any proposed adjustment. Even when appellee was willing to renew at the former rate, Cantlen had to take up with appellants and obtain their approval to renewal at the same rate. (Tr. p. 307.)

Appellee refers to negotiations between Cantlen and Mettalia. They did negotiate, but appellee's home office insisted from the start on renewal on a retrospective basis, and Cantlen never received anything except a Retrospective Rating Plan to submit to appellants. Cantlen never reached the point where he could submit a guaranteed rate of premium to appellants for their acceptance. He had first to get appellants to accede to the absolute and insistent demand that any rate be subject to a Retrospective Rating Plan. This is what he spoke to Coughlin about. That was the agreement he submitted. It was useless to discuss rates with Coughlin unless Coughlin was willing to accept the plan upon which appellee was insistent.

> "Q. From the time of your original negotiations with Mr. Cantlen the month of August, then, when you talked to him about rates, you were talking to him about a rate that would be adjusted according to the loss experience of the insured?
>
> A. That is correct." (Mettalia, Tr. p. 130.)

Cantlen at no time during the negotiations was able to obtain any offering from appellee on a guaranteed premium basis. Appellee would only consider the business on a retrospective basis. On August 15, 1946, appellee told Cantlen that the home office was insisting upon renewal on a retrospective basis. Cantlen then discussed a Retrospective Rating Plan with Coughlin and he was not pleased with it. Cantlen again took the matter up with Mettalia and O'Malley,

and they again told him that the company was adamant, and before the policies and retrospective agreement were delivered to Cantlen appellee gave a definite ultimatum that this was the only basis upon which the business would be taken. (Tr. pp. 262-263.)

The submission of a rate to the Bureau for approval was preliminary. It bound neither insurer nor insured. Appellee was never willing to issue a policy at the rate submitted, except on a Retrospective Rating Plan. Mettalia testified that he told Cantlen, who was endeavoring to obtain a guaranteed cost premium:

> "A. That I would try to work up some guaranteed cost basis, but certainly under no condition would the rate of $2.00 be acceptable as a guaranteed cost policy * * * and that if it did go on a guaranteed cost basis it would be in excess of $2.00." (Tr. p. 128.)

No guaranteed cost basis was worked out or submitted to Cantlen. The home office would not permit it.

On page 11 appellee makes this statement:

> "As far as appellee was concerned, at no time did appellants instruct their broker not to renew the insurance which appellee was willing to issue at the $2.20 rate."

Appellee was never willing to issue the insurance at the $2.20 rate except on a retrospective basis. Appellants were never willing to accept insurance on a

retrospective basis and insurance on a $2.20 guaranteed basis was never submitted to them.

At the bottom of page 12 and top of page 13 appellee again refers to the filings with the Commissions. A repeated endeavor is made to give these filings a distorted significance. The filings always take place, as a matter of course, whenever a binder is issued. Cantlen did not even have to ask that this be done. Appellee then makes this statement: "Then from and after September 1, 1946, the new policies were in existence but not actually written up." It is difficult to understand what appellee means by this statement. A binder was issued and the binder had been given a policy number, but neither rates nor terms had been agreed upon. They were never agreed upon. Appellee is in effect stating that a contract existed although there was no meeting of minds and nothing had been agreed upon. The number assigned to the binder would be assigned to any renewal policy that might be subsequently issued and accepted. Policy SPL-20968 was a proposed renewal policy, and was as a matter of course assigned that number. However, it was never proposed or submitted for acceptance except in conjunction with acceptance of a retrospective agreement on a retrospective basis.

The argument (p. 14) that after having made the filings with the Commissions, appellee had the right to believe that appellants had accepted "the new insurance" (referring apparently to these policies), is, for the reasons already set forth, without the slightest basis.

Appellee refers to a declaration of policy, as if this were something that in this instance could occur independently of execution of the retrospective agreement. The signing of the agreement and the declaration, or legal effectiveness or acceptance of the policies, were indissolubly connected. This is shown by the following testimony that appellee does not quote (Tr. p. 244):

> "Q. So you told him that the company was insisting on your declaration of the policies, as you put it, is that correct—the signing of the retrospective agreement and the declaration of the policies?
>
> A. Correct."

If we assume that the policies were effective when delivered to Bayly, Martin & Fay, then the insurance would have been renewed. Yet, thereafter, and as evidenced by the letter of C. L. Anderson, as late as December 11, 1946 (Def. Ex. RR) appellee was insisting and demanding that the insurance *be renewed* and fixed a time limit within which such renewal must be effected.

Appellee contends that although the policies were only offered in conjunction with a retrospective agreement, and appellee was unwilling to write the insurance on any other basis, in some inexplicable manner the policies became immediately effective on a guaranteed basis. The statement is made that the proposed retrospective agreement would have no effect on the "issuance" of the insurance. Appellee would disre-

gard, and its argument is absolutely inconsistent with, the proven facts in this case, which are just unanswerable. Appellee does not attempt to deny or dispute that the uncontradicted evidence is that from August, 1946, when renewal of insurance was first discussed, appellee refused to renew except on a retrospective basis. Appellants were never offered insurance on any other basis. Appellee never said to appellants: "We shall now write the insurance on a $2.20 guaranteed basis. You accept policies written on this basis and take under consideration the optional execution of a retrospective agreement that will change the rate according to your loss experience." Such an offer was not made and the instructions of appellee's home office prohibited it from being made. On the other hand, appellants never accepted such offer. Appellants were no more willing to accept a $2.20 guaranteed rate than appellee was willing to offer it. The argument of appellee assumes that appellants were willing to accept policies at that guaranteed rate, and that policies at such rate would remain in effect until appellee should see fit to cancel same. According to appellee, if it had not seen fit to give notice of cancellation in December, 1946, these policies would have remained in effect indefinitely. On such theory, the insurance had been renewed on a guaranteed basis of $2.20. Nothing could be further from the fact. There was neither such an offer nor such an acceptance. Appellee would have the parties bound by a contract to which neither had agreed.

Appellee in many instances has run separate portions of the record together as if it were a single context. An instance of this appears on page 18. It would seem therefrom that Coughlin had the retrospective agreement and the policy delivered for examination at the same time, and that he failed to read either. The fact is that the policy was not shown until October 22, 1947, almost ten months after coverage by appellee had ceased. Coughlin did not read the retrospective agreement because the plan had been explained to him and he knew that he was not interested. The letter denying liability that Cantlen dictated (Ex. 18) was signed by Davis.

We respectfully direct attention to the following sentence (p. 19):

> "Appellants' broker, who had accepted the policies from appellee and who had seen the \$2.20 rate specified therein, retained possession of the policies for appellants so informing appellants who, in turn, knew that insurance from and after September 1, 1946, was absolutely necessary to carry on their transport business without interruption."

Bayly, Martin & Fay received the policies with the agreement. It did not accept them. They had been received subject to acceptance only on a retrospective basis. Appellee gave it no right to accept them on any other basis, and according to Cantlen's own testimony appellants had never agreed to the retrospective agreement or a \$2.20 guaranteed rate of premium. If Cantlen told Coughlin that he had received the policies

with the agreement, of which he was by no means positive, the reference could only have been to policies that were referred to in and which would become effective provided Coughlin was willing to sign the retrospective agreement. Cantlen retained possession of the policies because he was still trying to induce Coughlin to accept the agreement. The negotiations were still pending.

The failure to collect the deposit premiums was but one of the several instances of conduct on the part of Fidelity and Bayly, Martin & Fay inconsistent with the theory that these policies became effective when delivered to Cantlen. It is not a question of when measures to enforce collection would ordinarily be taken against a delinquent debtor. It is the failure in this instance to pursue the usual procedure of billing and collecting deposit premiums. Bayly, Martin & Fay was the agent of Fidelity for collection of the premiums, and if these policies had been deemed in effect the deposit premiums would have been immediately billed and paid. This was the procedure followed in all prior years.

Appellee repeatedly refers to the premium to be charged on final audit. It is an element introduced solely to create confusion. A final audit would indicate whether the insured had paid the correct *amount* of premium. It would not affect or indicate the *rate* of premium. In the case of a guaranteed rate of premium, the fixed rate would be at all times known and at all times applied. The rate of $1.223 would not be applied during the term of the policy and a rate

of \$2.20 on final audit. Bayly, Martin & Fay would not have accepted and processed premiums paid at the rate of \$1.223, unless that was *the* premium rate. In the case of a Retrospective Rating Plan the rate will depend on loss experience during the policy term. These policies are claimed to have been effective from September 1, 1946 at a guaranteed \$2.20 rate, and admittedly not on a retrospective basis.

The final audit in this case developed that appellants had correctly reported their gross receipts. The figures were submitted to Davis for approval. When there was written or who wrote the words upon the audit sheet "Assured refuses to sign retrospective agreement—retrospective rate not to be used", does not appear. This was apparently the first time that such a contention was thought of. Davis looked only at the figures submitted to him. Three years later he could not honestly state that he remembered what, if anything else, was on the sheet on which the figures appeared, and he so testified. However, Challburg testified definitely that there was nothing on the sheet shown Davis other than the gross receipts. In refutation of the endeavor to make it appear that Davis approved the notation as to the rate of premium, we quote Challburg's testimony:

> "Q. Were there any extensions or anything upon the document you showed to Mr. Davis other than the gross receipts for his approval?
>
> A. That is all.
>
> Q. The only thing you showed Mr. Davis for his approval were gross receipts whether or not

they were correct, as you took them from the books of the California Motor Transport Company?

A. That is right.

Q. And Mr. Davis then appended his signature approving your figure as correct?

A. Yes." (Tr. p. 171.)

Appellee refers to the payments made by appellants as "voluntary payments", and as having "nothing to do with the balance of the premium due appellee as shown by final audit." These again are simply words calculated to lend confusion. The payments were no more "voluntary" than the payment of premiums by any insured. Appellants were not making and Bayly, Martin & Fay was not accepting as Fidelity's agent, premiums at a rate that was approximately half of that at which the insurance is asserted to have been actually carried. The final audit had absolutely nothing to do with the rate.

Appellee states that after this final audit it billed the broker and that the broker in turn billed appellants. What happened was that appellee billed the broker and the broker contended that the bill was unjustified and out of order. The broker did not bill appellants until October 22, 1947, and then told appellants not to pay the bill and to write the letter Cantlen dictated denying liability. Appellee refers to Exhibit 17, a letter addressed by Bayly, Martin & Fay to appellants, making a demand for additional premium. Although the letter is dated August 7, 1947, it was not mailed and was only delivered on October

22, 1947, at the time that Cantlen dictated and had appellants sign Exhibit 18.

On page 26 of its brief appellee sets forth the argument made to Cantlen in justification of the charge now sued upon. The argument is an admission that these policies were not written on a guaranteed basis. We call attention to this statement:

> *"The broker was clearly told by appellee 'that the company would not have issued the policies at a lower rate on a guaranteed basis, and that if the insurance company issued the policies on a guaranteed basis they would have insisted upon a rate of $2.20'."*

The argument is a frank and unqualified admission that the policies were not in fact issued on a $2.20 guaranteed basis. The present action is based on the claim that the insurance company *did issue* the policies on a guaranteed basis. If this had been true, appellee's contention in justification of the charge made would not have been that *if* the policies *had been written* on a guaranteed basis the guaranteed rate would not have been less than $2.20.

Repeated efforts are made to place a distorted significance on the presentation of claims. The claims were not presented under these policies. The question in this case is not whether or not there was insurance, but whether insurance existed under these particular policies. If insurance existed at all, appellants were entitled to present claims and refer for defense actions upon claims.

Let us assume, again, that during the binder period, and before appellee had offered any policy of insurance, appellants had determined there was no hope of negotiating satisfactory coverage with Fidelity and had placed their insurance elsewhere, or that Fidelity had determined that it did not want to offer any insurance to appellants. Certainly, all claims which had arisen from the beginning of the binder period to the date of termination of negotiations would have had to be paid or defended by Fidelity. Exhibit 9 discloses that a claim arose on September 1, 1946, the very first day of the binder period. Most assuredly appellants were entitled to have that, and all similar claims defended, whether or not a policy was ultimately offered and accepted.

Appellants unquestionably had the right to expect and demand that their claims be paid or defended. Insistence thereon did not constitute a recognition of the disputed policies. The entire conduct of appellants was consistent with their present position, that they were covered not by the policies, but by the binder, extended by implication, or an implied extension of the former policy. Appellee emphasizes the fact that appellants referred claims to it after they knew of the demand for additional premiums and ask this Court to accept such reference as a ratification of the policies. It cannot have such an effect. Appellants upon receiving notification of the demand for additional premiums, denied liability therefor. They maintained that they had fully performed their contract by paying premiums at the rate they understood was

in effect. They demanded like performance of Fidelity. The acceptance by Fidelity of such claims, with the knowledge that appellants did not recognize the policies in dispute as their insurance coverage, but were relying on the binder or an implied extension of the former policy, may be construed to be an admission on the part of Fidelity that its obligation existed separate and apart from the policies. This is not a case in which one has accepted the benefit of a policy of insurance and has refused to pay the premium. This is a case in which there exists a dispute as to insurance coverage that was actually effective. Under these circumstances the presentation of claims by appellants and the acceptance of them by Fidelity cannot and does not amount to a ratification of the policies claimed to have been in existence by Fidelity. Rather, since appellants had considered that they had performed their obligation in full, and had so notified Fidelity, the recognition of the obligation to defend by Fidelity may more logically be construed as an admission of the validity of the position of appellants.

Even with respect to the claims themselves, appellee makes a misstatement:

> "In making reports to appellee, appellants used regular forms approved by the National Bureau with policy numbers appearing on the forms in some cases, although not always." (Appellee's Brief, p. 38.)

The fact is that the policy numbers did not appear on the forms submitted by appellants. The testimony

of appellee, itself, establishes this fact. (Tr. pp. 121-122.)

ARGUMENT.

We turn now to appellee's arguments. Appellee does not attempt to prove that these policies were offered for acceptance on a guaranteed basis, or to answer the detailed argument of appellants demonstrating that these policies were only submitted in conjunction with the retrospective agreement. Appellee does not attempt to prove that appellants were ever willing to pay or agreed to pay a $2.20 guaranteed rate of premium.

It is contended that by accepting the benefits of the policies, appellants became obligated to pay the premiums. The argument begs the question. Appellants claim that they were entitled to these same benefits under a former policy and binder, and that they paid and appellee accepted payment for these benefits at the rate of the former policy. Appellee's argument assumes that appellee made an offer and that appellants accepted that offer by taking its benefits. The first insurmountable difficulty is to prove the offer. This appellee does not and cannot do. The second difficulty is that the benefits enjoyed were not attributable to the asserted offer, but were benefits that had been enjoyed under a prior policy, for the extension of which a binder had been issued and for which benefits appellants paid at the rate of the former policy.

FINDINGS AND JUDGMENT.

Appellee asserts over and over that the findings are supported by substantial evidence. but completely fails to answer the arguments presented. Let appellee explain when or how the policies could have become effective in the face of the following undisputed facts:

1. Consistent refusal of appellee to consider the renewal of the insurance on a guaranteed basis.

2. Submission of the policies in conjunction with the retrospective agreement, which by its terms modified the rate set forth in these policies.

Can appellee point out when or how appellants or Bayly, Martin & Fay ever indicated that appellants were willing to accept policies bearing a $2.20 rate of premium?

Can appellee explain the conduct of Bayly, Martin & Fay and Fidelity in connection with this insurance? If these policies had actually been in effect Bayly, Martin & Fay would have known it and so would appellee. There could not possibly have been this combination of errors:

Payment of the former premium by appellants.

Acceptance of the former premium by Bayly, Martin & Fay.

Acceptance of the former premium by appellee.

Retention of the policies by Bayly, Martin & Fay.

Contention by Bayly, Martin & Fay that appellee was not entitled to charge the additional premium.

Can appellee explain away the admitted argument of appellee in support of the charge made, that if it had written the insurance on a guaranteed basis it would have charged a $2.20 rate?

When analyzed, the arguments of appellee are mere evasions. The findings of the Trial Court of the legal effectiveness of the policies are unsupported. After the Court's opinion it would have been a vain and useless act to present findings supporting a position at variance with the opinion.

Appellee argues that since the policies were in effect entitling appellee to the premiums claimed, the binder has nothing to do with appellee's claim. This argument again begs the question. Appellee just will not, undoubtedly because it cannot, squarely meet the issue in this case. Of course, if the insurance had been renewed, the renewal policies would have supplanted the binder. The point is that the insurance was not renewed by these policies. The policies were written and delivered to Bayly, Martin and Fay. In that sense only were they issued. With so much every one agrees. However, the policies did not become effective and supplant the binder, unless they were offered for acceptance on a guaranteed basis and accepted on that basis. This, the evidence does not support, and appellee simply evades the issue. The main question in this case is assumed. On the assumption that the policies were issued (in the sense of having become

legally effective) it is reasoned that they supplanted the binder. The fallacy is in the assumption.

Appellee in like manner argues that the retrospective agreement has nothing to do with appellee's claim. The contention is that the policies became effective without the signing of the retrospective agreement. To prove this contention appellee must do more than refer to some self-serving conclusions of Mettalia that the acceptance of the Retrospective Rating Plan was not a condition to the effectiveness of the policies. Appellee is faced with the following undisputed facts, which it seems necessary to repeat in order to demonstrate the repeated fallacies of appellee:

1. Appellee from the start of negotiations positively refused to consider the renewal of the insurance on a guaranteed basis.

2. Appellee from the start of negotiations insisted that the insurance be renewed on a retrospective rating basis.

3. The policies were written in conjunction with an agreement embodying a Retrospective Rating Plan expressly converting the rate of premium set forth in the policies into a fluctuating rate, dependent on loss experience of the insured.

4. The agreement and policies were simultaneously submitted to Bayly, Martin & Fay.

5. The Retrospective Rating Plan was refused.

The foregoing facts, which are of the essence, are undisputed and appellee simply ignores them. Testimony and evidence that show beyond any possible doubt that the signing of the retrospective agreement was a condition of renewal, set forth in appellants' opening brief, are unchallenged and unanswered. No attempt is made to explain how Bayly, Martin & Fay could have so grossly erred as to retain the policies, accept and process premiums at the rate of the former policy, refuse to send bills for additional premium to the insured and dispute any right on the part of appellee to charge premiums at a $2.20 guaranteed rate.

On pages 52 and 53 appellee again combines testimony from various portions of the record, covering different times and matters, as if they were part of a single context. Portions of the record explanatory of what is set forth are omitted. For example, immediately following the portion of Cantlen's testimony quoted on page 53, there appears in the record the following question and answer, definitely showing that the premiums were only to become effective in conjunction with the retrospective agreement:

> "Q. (Mr. Murman.) I would like to have you take Policy No. 20968, the primary policy, plaintiff's Exhibit 3, and point out to the Court where in that policy there is any reference made to the retrospective agreement.
>
> A. It would not be necessary to be referred to in here because the policies were definitely issued with the understanding that the retrospective agreement would be entered into." (Tr. p. 295.)

At the bottom of page 53 appellee makes this argument:

> "In view of the foregoing, appellee urges that the unexecuted retrospective agreement can be of no evidentary value in this law suit since it never bound the parties and clearly, whether executed or not, was not intended as a condition to the effectiveness of the insurance which appellants concede covered them for all purposes."

The agreement never bound the parties and neither did the policies, for the agreement and policies constituted a single offer, which was not open for acceptance in part. The statement or implication that appellants concede that they were covered by these policies is just a plain and bald misstatement. If the case of appellee were meritorious resort would not be had to such methods of argument.

On page 55 appellee contends that voluntary audits and deposit premiums had nothing to do with appellee's claim. The repeated payment of premiums at the rate of the former policy, the acceptance and processing of the payments by Bayly, Martin & Fay and the reports and remittances of Bayly, Martin & Fay to appellee, which it accepted and approved, are referred to as "voluntary audits." The failure to collect any deposit the premiums is an irregularity and deviation from standard practice indicative, in the same manner as the other acts of conduct, that the policies were not considered operative so that it was in order to collect the deposit premiums.

The acceptance of premiums at the rate of the former policy has been referred to both as evidence that the rate in the policies in question was not effective, and also as a waiver and estoppel. Appellee's answer is again nothing but an assumption that begs the question. Appellee's argument is that policies had been issued to supersede the binder. In order to supersede the binder the policies had to be effective, and this is the very question in issue. Then follows this statement:

> "So the policies alone determine the $2.20 rate which was used in connection with the final audit in computing the amount on which the premium balance rests."

Here again the argument is nothing but an assumption of the issue and another confusing reference to the "final audit." If these policies determined that appellants were obligated to pay a $2.20 rate, then that obligation existed from September 1, 1948. It did not arise in April, 1947, the date of the final audit. The acceptance of another rate, which was that of the former policy, as the basis for all premium earned from September 1, 1946 until January 21, 1947, was a clear indication that a rate of $2.20 was not considered in effect. Appellee does not dispute the fact that Bayly, Martin & Fay was the agent of Fidelity for the collection of the premiums, and that its action in accepting and processing the payments was that of Fidelity.

The point of waiver and estoppel is not answered. The defense was pleaded and there was no finding

thereon. It is a meritorious defense. Appellee's conduct lulled appellants into the belief that they were covered by the rate of the former policy and that was the reason that appellants did not immediately place the insurance elsewhere.

Appellee contends that actions of Bayly, Martin & Fay, the broker, bound appellants by these policies. The actual lack of authority to do any such thing is undisputed. At no time was Bayly, Martin & Fay authorized to accept insurance without the submission to and express authorization of appellants. Cantlen testified that appellants never agreed to pay a $2.20 rate of premium. What did Bayly, Martin & Fay do that bound appellants by these policies? It received the policies with the retrospective agreement. It retained the policies in its possession, while it was endeavoring on the one hand to get appellants to favorably consider acceptance of insurance with a Retrospective Rating Plan for premium, and endeavoring on the other hand to get appellee to quote a guaranteed rate of premium. Bayly, Martin & Fay told appellee that appellants were not disposed to accept a Retrospective Rating Plan. It never told and never had occasion to tell appellee that appellants would not agree to a $2.20 rate of premium, as such an offer was never submitted to it for transmission to appellants, and the notification that appellants would not pay such a rate would have been a wholly gratuitous remark.

Reference is made to the fact that Bayly, Martin & Fay used the number SPL-20968 in reporting, re-

mitting and presenting claims to appellee. As pointed out in the opening brief, this reference has no significance. The number was assigned arbitrarily in August, 1946, when the binder was issued, and thereafter in all communications between Bayly, Martin & Fay and appellee the coverage was identified by that number. The lack of significance of the letter to the American Manganese Company has already been considered. As appellee was entirely ignorant of this communication, it could not by any possibility have been an act on the part of Bayly, Martin & Fay bearing on acceptance of these policies.

On page 62 appellee makes this statement:

> "Failure to sign the proposed retrospective agreement as to the final audit premium would also appear immaterial where the conduct of the parties claim-wise showed each believed the insurance was in force as written until cancelled."

The conduct of the parties does anything but show they believed the insurance was in force under these policies. The final audit did not affect the rate of premium. If the policy had been regarded as effective, Bayly, Martin & Fay, as *the agent of appellee,* would have collected the rate of premium that the policies called for. Claims were presented because coverage existed pending negotiations for renewal. The premiums for this coverage were paid and accepted. The claims for losses would have been presented by appellants in exactly the same manner, if the proposed policies and retrospective agreement had never been written. Coverage existed under the binder

or an oral extension of the former policy. That coverage would end if and when it was supplanted by new policies. It remained in effect until so supplanted or until cancelled. Under it appellants were insured, were entitled to present claims, and appellee was bound to accept and assume the care of such claims.

Appellants did not accept any benefits from or under these policies. They accepted only the benefits to which they were entitled under extended coverage pending negotiations for renewal. The contention that benefits were accepted under these policies again assumes that the policies became effective.

The final contention is that appellants ratified the acts of their agent, Bayly, Martin & Fay. Bayly, Martin & Fay did nothing that purported to bind appellants respecting acceptance of these policies. There was nothing for appellants to disavow. Appellee argues that Bayly, Martin & Fay accepted the policies by retaining possession of them. Possession was retained while endeavoring to get approval of the retrospective agreement. Appellee is not in a position to submit to the broker an agreement and policies for combined acceptance, approve the retention of the agreement while an endeavor is made to induce its acceptance by the insured, and at the same time contend that the retention of the policies constitutes an acceptance of them by the insured independently of the agreement.

CONCLUSION.

The appellee in this case is endeavoring to recover premiums on policies that the evidence positively demonstrates never became effective. The judgment in favor of appellee is inconsistent with the undisputed facts. If appellee had the right to collect premiums on these policies, then appellants would have had the right to enforce claims arising under them. We have previously posed the question, and here repeat it, because we believe it is crucial. Let us assume that these policies did not purport to cover the same risks as the former Policy 1457, but covered other risks and other equipment. Let us assume that a loss occurred of this added character, and that appellants claimed that these policies had been issued and accepted (not simply written and delivered, but issued in the sense of having become legally effective). Let us assume that appellee claimed that the documents, the testimony and the conduct of the parties showed conclusively that the policies were only to become effective when and if the retrospective agreement was signed, a condition that never was fulfilled. In the face of the undisputed evidence in the record of this case, such a contention on the part of appellants would have been deemed nothing less than outrageous. Once the clouds of confusion raised by appellee have been dissipated, the claim asserted by appellee will be deemed to be equally devoid of merit. Indeed, the rights are reciprocal and must stand or fall together.

No. 12,722

United States Court of Appeals
For the Ninth Circuit

CALIFORNIA MOTOR TRANSPORT CO., LTD. (a corporation), et al.,
Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK (a corporation), and BAYLY, MARTIN & FAY, INC. OF CALIFORNIA (a corporation),
Appellees.

Upon Appeal from the United States District Court of the Northern District of California, Southern Division.

APPELLANTS' REPLY TO BRIEF OF APPELLEE BAYLY, MARTIN & FAY, INC., OF CALIFORNIA.

A CONFUSING USE OF TERMS.

Bayly, Martin & Fay in its brief repeatedly refers to the "issuance" and "issue" of Policies SPL-20968 and SPL-20950. When appellee uses these terms it refers to the writing of the policies and the physical delivery of same to appellee, together with the retrospective agreement. At the bottom of page 9 of its brief appellee states "whether the policies in question,

that had been issued in fact, were or were not 'issued' as a matter of law is to be decided between plaintiffs and defendants and does not affect third party defendant." By the words "issued in fact", appellee can only mean that the policies were written and delivered to said appellee with the retrospective agreement. By the word " 'issued' " as a matter of law" said appellee can only mean "issued" in the sense of having become legally effective, offered and accepted on the same terms, binding upon insured and insurer.

No one questions the fact that the policies were written and delivered to Bayly, Martin & Fay in conjunction with the retrospective agreement. When appellee in its brief states that the policies were issued, when it states that it informed appellants that the policies were issued, it refers to these undisputed facts, and entirely and completely avoids the questions of whether the policies were only offered in conjunction with the retrospective agreement, to be effective only on execution of that agreement, and whether they ever became effective by acceptance and compliance with the condition upon which they were offered. With the vital issue in this case, said appellee maintains that it is not concerned. We must avoid being confused by subtle and misleading use of terms.

GENERAL STATEMENT.

While we earnestly contend that such is not the fact, for the purpose of considering the third party issues it must be assumed that policies containing a guaran-

teed premium of 2.20 per cent of gross receipts were issued by Fidelity and were accepted by some act or omission of third party plaintiffs or defendant. Under the evidence adduced at the trial of this action, the conclusion is inescapable that if a liability on such policies exists it could only have arisen by wrongful and unauthorized action of third party defendant.

The position of third party defendant is an anomalous one. At no time did it ever consider or believe that the policies herein sued upon (policies bearing a flat, guaranteed premium of 2.20) were ever issued, offered or open to acceptance. Nevertheless, it disclaims any liability for the unauthorized acceptance of these policies and bases its disclaimer on the ground that it fully performed its duty by advising third party plaintiffs of the receipt of policies issued in conjunction with a retrospective premium plan. No attempt is made by third party defendant to explain how, or in what manner advice of the receipt of such policies could in any way be construed to release it from liability for the acceptance of the policies in dispute, policies bearing a guaranteed rate of premium.

The implication is, and appellee's argument is based upon the assumption, that when Bayly, Martin and Fay told Coughlin of the receipt of policies, it told him of the receipt of policies which bore a guaranteed rate of premium and which were effective without signing the retrospective agreement, instead of the receipt of policies of which the retrospective agreement was an integral part. Such implication and assumption are erroneous.

It is manifest that third party defendant, at all times, considered and understood that the policies it had received were issued in conjunction with, and as an integral part of a retrospective premium plan. The testimony of third party defendant conclusively establishes this fact. The following excerpts from its testimony are worthy of note in this regard:

> "A. Yes. They set up those rates, but they were issued in conjunction with another agreement.
>
> Q. I would like you to take policy No. 20968, which is the primary policy, plaintiff's Exhibit 3, and point out to the court where in that policy there is any reference made to the retrospective agreement.
>
> A. It would not be necessary to be referred to in here because the policies were definitely issued with the understanding that the retrospective agreement would be entered into." (Tr. 295.)

* * * * * * *

> "Q. Why did Bayly, Martin & Fay not deliver Policies 20950 and 20968 to California Motors prior to October 22, 1947?
>
> A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed, so, therefore, in our opinion, the transaction wasn't completed." (Tr. 273.)

* * * * * * *

> "Q. Did you tell him that, in your opinion, the company wasn't justified in claiming additional premiums?
>
> A. I told him that I did not believe that they were entitled to the 2.20 rate on the earned

premium developed, or, in the gross receipts reported.

Q. What was your full conversation with him pertaining to that?

A. I contended that the rate was excessive; in other words, they were charging this earned premium on a guaranteed basis, and that I would not—the assured never agreed to pay 2.20 on a guaranteed basis, and I felt that the rate was excessive on the guaranteed basis * * *'' (Tr. 276.)

* * * * * * *

''Q. Did you tell him anything in addition to that?

A. Well, I made the same contention as I made to Mr. Mettalia, and I did not agree or ever felt that they were entitled to charge on a guaranteed basis rate, the rate that was proposed on the retrospective basis.'' (Tr. 277.)

* * * * * * *

''Q. What was said?

A. I objected to the rate charged in this final audit, and contended that the rate of 2 per cent for the primary should not apply at the earned premium because the rate of 2 per cent was only —was to be used in connection with the retrospective agreement, or retrospective agreement basis, and I felt that they were not charging a correct premium in applying the 2.20 rate for the over-all coverage.'' (Tr. 336.)

* * * * * * *

''A. I had a further meeting with Mr. Mettalia and we were—we went over into Mr. Anderson's office to review the whole situation again, and I made the same contention, that I did not feel that the insurance company was entitled to

use the 2.20 rate basis because that basis was to be used in connection with the retrospective agreement, and that my assured had never agreed to a 2.20 rate on a guaranteed basis, and that in view of the retrospective agreement not having been signed and entered into, that I could not agree with them that they were entitled to a 2.20, which would have been the standard rate under the retrospective plan." (Tr. 336-337.)

* * * * * * *

"A. Yes. I remember when the young lady brought the remittance in, called to my attention the remittance had been received, and I told her to hold it up because the transaction had not been completed as far as we are concerned; *there was no agreement;* the assured had not signed or agreed to the retrospective basis on which the company was insisting, and so I felt that it was still an unsettled problem, and, to my best recollection, I told her just to hold that temporarily.

Q. Were you asked on direct examination, when someone else called you as a witness, as to why you didn't deliver the policy to Mr. Coughlin when you received it in October, 1946?

A. I didn't deliver the policies to Mr. Coughlin because the policies were issued in conjunction with the retrospective agreement, and until and unless the retrospective agreement was signed I didn't wish to involve the contracts and put them through our books. It was still an unfinished matter, as far as our office was concerned." (Tr. 338-339.)

We also call attention to the following statements made in said appellee's brief:

"On or about September 23, Cantlen was called to the Fidelity and Casualty Company office and delivered an *ultimatum* that the policies would have to *issue on a retrospective plan basis.* (Tr. p. 326); shortly thereafter Cantlen received the policies SPL 20968, and the proposed retrospective agreement, Defendants' Exhibit C; upon receipt of the policies Cantlen read them and knew that the rate was therein set up as a standard rate of $2.00 per $100 of gross earnings.

Immediately after receiving the policies and the retrospective agreement from the plaintiff Cantlen went to see Coughlin taking with him the proposed retrospective agreement but not taking the policies because Bayly, Martin & Fay did not consider the issuance of the policies a completed transaction because of the insistence of plaintiff that the retrospective agreement be signed; the policies were finally physically delivered to the defendant on or about October 27, 1947, at which time Cantlen was still arguing with plaintiff that they should not charge the the $2.00 standard rate." (Bayly, Martin & Fay Brief, p. 6.)

Again (page 15):

"The very plausible reason that the policies were held by third party defendant was, as stated by Mr. Cantlen:

'A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed, so, therefore, in our opinion the transaction wasn't completed.' (Tr. p. 273.)"

Bayly, Martin & Fay never had any idea that the rate set forth in policies 20968 and 20950 would be charged until the demand made by plaintiff on April 19, 1947.

> "Defendants make a further point of the fact that third party defendant did not immediately notify defendants of a premium demand which third party defendant received on April 19, 1947. What defendants overlook is that this was the first notice to third party defendant that plaintiff was definitely claiming payment at the $2.20 rate. (Tr. p. 275.) Following receipt of this demand Mr. Cantlen for third party defendant engaged in discussions with plaintiff as to the validity of this claim, disputed the right of plaintiff to collect the same (Tr. pp. 276-277), and finally assisted in the drafting of a letter to plaintiff over the signature of defendants, which letter is plaintiff's exhibit 18, declining payment of the invoices. (Tr. pp. 278-279.)" (A. B. pp. 18-19.)

If Bayly, Martin & Fay had considered these policies in effect, notwithstanding failure of execution of the retrospective agreement, it would have known that the rate therein provided would be applicable and without waiting until April 19, 1947 to receive a demand from plaintiff. If it had considered the policies effective, there would have been no basis for it to dispute the validity of the charge, or to instruct defendants to deny liability. As Bayly, Martin & Fay did not expect the plaintiff to charge the rate provided for in these policies and disputed the right to charge the same, Bayly, Martin & Fay must have con-

sidered that the rate in effect was that in the former policy No. 1457. That was the rate that had been paid and no other rate had been discussed. That rate could only have been considered effective under the binder or an oral extension of the former policy.

If third party defendant never knew, believed or considered that the policies it had received were issued and open to acceptance on a guaranteed premium basis, how may it now maintain that it advised third party plaintiffs of the receipt of such policies? It cannot. If we accept the premise that the evidence is sufficient to establish that third party defendant advised third party plaintiffs of the receipt of some policies, it necessarily follows that it could have advised third party plaintiffs only of the receipt of policies conditioned upon the execution of a retrospective agreement and not the policies upon which suit was brought.

Third party defendant never delivered or even showed the policies to third party plaintiffs. It retained them in its possession and control until long after liability thereon had been incurred. Third party plaintiffs were in no position to know the contents of the policies. If the Trial Court was correct in determining that the policies sued on were offered on a guaranteed basis, that the retrospective agreement was not an integral part of them, and that by retention of the policies acceptance followed, it necessarily was the mistake or negligence of third party defendant alone which gave rise to the acceptance of the

policies. It knew, or should have known, the nature of the policies offered. It alone, between the third party litigants, had possession of the policies and the opportunity to review them. If it failed to realize that these were guaranteed premium policies and by its retention of them caused acceptance to be implied, it is responsible to third party plaintiffs for the damage suffered.

ACCEPTANCE OF THE POLICIES COULD ONLY HAVE BEEN BY THE UNAUTHORIZED ACT OR OMISSION OF THIRD PARTY DEFENDANT.

While third party defendant had acted as broker for third party plaintiffs for some years, it had no authority to accept policies of insurance for its clients without the clients' express approval. (Tr. pp. 306-308.)

Third party plaintiffs at no time gave their approval to the policies here in question. The testimony of third party defendant conclusively establishes this.

> "Q. Did Mr. Coughlin tell you he would accept or approve the policy of the combined rate of $2.20, as compared with the rate of 1.223, which he had been paying?
>
> A. No, he did not.
>
> Q. Did you ever tell Mr. Mettalia or Mr. O'Malley that California Transport Company would accept policies with a $2.20 rate?
>
> A. No, I did not." (Tr. 272-273.)

*   *   *   *   *   *   *

> "Q. I call your attention to this statement; 'at no time did we agree to a rate of 2.20 as

against our former rate of 1.223.' Did you draft that statement?

A. Yes." (Tr. 279.)

Throughout his entire testimony Cantlen reiterated that the assured had never agreed to pay 2.20 on a guaranteed basis and that he, himself, believed the rate was excessive and was not a proper rate. There was no express acceptance of the policies by either third party plaintiffs or defendant. Acceptance, if any existed, could only have been implied from the facts and circumstances.

Acceptance certainly could not be implied from any act performed by third party plaintiffs. Third party plaintiffs had entrusted the negotiations for insurance to third party defendant. They took no part in these negotiations, save and except, to express disapproval of the proposals made. They had no knowledge of any proposal on a guaranteed premium basis. They would not have agreed to pay a 2.20 rate of premium, and third party defendant knew it. Third party plaintiffs had never seen the policies, which were delivered to their broker. When they paid premiums, they were not the premiums called for by the policies sued upon, but were premiums called for by the prior policy held by them. Nothing was done by third party plaintiffs which could be construed as a basis for claiming acceptance of policies bearing a guaranteed rate of premium of 2.20.

The Court's finding that the third party defendant received and accepted the policies sued on with the

knowledge of and in accordance with instructions of third party plaintiffs finds no support in the evidence. (Tr. 60-61.)

Acceptance could have arisen only by the negligence or mistake of third party defendant. It was, and is, an experienced brokerage firm. It knows its duties in regard to the handling of insurance matters. It knew, or should have known, that by retaining policies in its possession a possible liability on behalf of its principals might arise. It knew, or should have known, that the policies it had received and retained, carried a guaranteed premium rate of 2.20. It knew it lacked authority to accept such policies. If any liability exists, it exists because third party defendant retained the policies and failed to notify the insurer that such policies were unacceptable. Had it delivered these policies to third party plaintiffs promptly upon receipt, they would as promptly have been rejected.

Under the provisions of section 383.5 of the Insurance Code of California, as set forth at length on page 58 of appellant's opening brief, a broker who fails to deliver policies to an insured is made liable for all damages sustained thereby. The purpose of this section is set forth in the law itself, to wit:

> "The purpose of this section is to prevent fraud, *or mistake,* in connection with the transaction of insurance covering motor vehicles * * *"

No clearer example of the reason for the statute could be made out than has been established by the facts in the instant action.

REPLY TO THIRD PARTY DEFENDANT'S BRIEF.

It is difficult to answer the brief submitted by third party defendant because it argues a matter not in litigation. All of the arguments contained in this brief deal with policies bearing a retrospective rating premium plan. None of the arguments applies to the policies here in question. The brief is utterly devoid of any reference or argument based upon the guaranteed premium for which recovery is sought. In its statement of the case third party defendant refers to policies "in question" as though the policies were retrospective rating policies. In its statement of facts third party defendant refers repeatedly to a retrospective rating plan, but makes not one statement concerning the guaranteed rate, herein sought to be recovered. Third party defendant does not claim it informed third party plaintiffs that if they failed to sign the retrospective agreement the basic rate in that agreement would become a guaranteed rate for which third party plaintiff would be bound. It does not even claim it knew such was the case. There is not one statement in the entire brief that third party defendant ever informed third party plaintiffs it had accepted any policies of insurance, even under the mistaken belief that they were retrospective policies. Giving an insured information concerning the receipt of proffered policies is a far cry from advising an insured that one is holding policies which it has accepted or which would be considered accepted if not returned. Advising one of the receipt of policies is far

removed from compliance with the mandatory duty of delivery of policies. Third party defendant may not casually brush aside this admitted breach of duty by the disarming statement that it notified third party plaintiffs of the issuance of policies. (Tr. p. 11.)

In reading the brief of third party defendant we cannot too urgently impress upon the Court the necessity of considering that whenever the word "policies" is used by third party defendant it is used in connection with policies issued in conjunction with and as an integral part of a retrospective rating plan, and that whenever the words "premium rating" or "rate" are referred to in the brief these words refer to a premium rate or a rate determined in accordance with such a retrospective plan. If the Court bears these facts in mind, it will readily see that there is not one shred of evidence in the record, nor one argument advanced, to support the position of third party defendant or the findings made in its favor.

The breaches of duty by third party defendant, which were the cause of liability, remain undisputed. These breaches were pointed out in third party plaintiffs' opening brief. They have not been countered and, in effect, all have been admitted. It is submitted that the following breaches of duty clearly establish this liability of third party defendant.

1. Third party defendant lacked authority to accept policies bearing a guaranteed rate of premium of 2.20 and realized it lacked such authority.

2. Third party defendant lacked authority to accept the retrospective plan offered and realized it lacked such authority.

3. Third party defendant retained the policies in its possession and failed to deliver them to its principals in accordance with law.

4. When the demand for additional premiums was made, third party defendant concealed the fact of such demand from its principals for approximately six months.

In addition to these flagrant breaches of duty the entire conduct of third party defendant was inconsistent with the obligation it owed its principals. A chronological review of the events which took place during the period sets forth in bold relief that it was the acts and omissions of third party defendant, and third party defendant alone, from which liability, if any exists, must stem.

At the time the question of renewal first arose Fidelity insisted upon a retrospective plan of insurance and third party plaintiffs refused to accept such a plan. Negotiations were then begun. The binder was obtained by third party defendant for the express purpose of keeping its principals covered during these negotiations. It was issued by Fidelity because it still hoped to secure third party plaintiffs' insurance business for the ensuing year. This binder was delivered to third party plaintiffs by third party defendant with a covering letter stating that the binder

would be third party plaintiffs' coverage pending renewal.

During the period covered by the binder third party defendant received certain policies of insurance together with a retrospective plan. Accepting as true that it advised third party plaintiffs of the receipt of such policies, it did not deliver them to third party plaintiffs but only delivered to them the retrospective plan with the request that they reconsider the same. At that time, when third party defendant knew the policies and plan were still unacceptable to its principals, it became the duty of third party defendant (assuming that there was any severance of the policies from the retrospective agreement and that retention of the policies could be construed as an acceptance) to either return the policies to Fidelity or to advise Fidelity that the policies had not yet been accepted but were under consideration. The binder was still in effect and the interests of its principal would have been protected. This it failed to do.

When the 60 day period of the binder expired and third party defendant was still unable to arrange for satisfactory coverage, it was its duty, if it believed further negotiations might prove fruitful, to secure an extension of the binder until such time as it could be determined whether policies of insurance acceptable to its principals could be obtained from Fidelity. Failing this, it was its duty to advise its principals of the termination of the binder and of the requirement that they either accept the policies offered or

place their insurance elsewhere. Neither of these things did third party defendant do.

Third party defendant seeks to place the blame for its failure on the shoulders of its principals. It seeks to do this by the extraordinary contention, iterated and reiterated throughout its brief (T.P.D. pp. 5, 14, 15, 16, 22), that its principals should have realized that the binder had expired, had not been renewed, and that if they were covered by insurance they could only have been covered by virtue of policies which they had never seen and which they had expressly rejected; that they had means of gleaning this information from a copy of a letter written by third party defendant in answer to a routine inquiry.

As third party plaintiffs pointed out in their opening brief (T.P.P. pp. 62-64), we are not here concerned with parties dealing at arm's length. We are concerned with principal and agent, a confidential relationship, which places the burden of complete disclosure upon the agent. This burden is not met by showing that the principals might have secured the information had they pursued an independent investigation. It is met only by an honest and complete disclosure by the agent. Third party defendant has failed utterly to discuss or mention this vital point. It does not question its soundness or applicability. The authorities cited are unanswered. Its significance cannot be avoided or its importance buried by silence or casual disregard. Respondent cannot avoid responsibility by reason of the letter to the American Manga-

nese or other notices or clues that, if pursued, could have led to discovery.

Third party plaintiffs had no reason to believe that the policies they had rejected were being retained by their broker without information having been transmitted to Fidelity that they were unacceptable. They had the right to presume, in the absence of notice from their agent, that the insurance company had been informed that the policies were unsatisfactory, and that an extension of coverage had been arranged in accordance with the original letter forwarding the binder. They could not presume that policies had been accepted in direct violation of their instructions. Knowing nothing whatsoever about policies bearing a guaranteed premium of 2.20, no act on their part could be construed as an acceptance of such policies.

In an attempt to justify its failure to deliver the policies as required by law, third party defendant contends that the policies were only delivered in conjunction with the retrospective agreement, that the retrospective agreement had to be signed and until signed the entire transaction was inchoate, and that consequently there were no policies in effect that it had the duty to deliver.

> "The very plausible reason that the policies were held by third party defendant was, as stated by Mr. Cantlen:
>
> 'A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed,

so, therefore, in our opinion, the transaction wasn't completed'. (Tr. p. 273.)"

(T.P.D. B. p. 15.)

Third party defendant might also have quoted the following additional testimony to the same effect given by Mr. Cantlen:

"I didn't deliver the policies to Mr. Coughlin because the policies were issued in conjunction with the retrospective agreement, and until and unless the retrospective agreement was signed I didn't wish to involve the contracts and put them through our books. It was still an unfinished matter, as far as our office was concerned." (Tr. p. 339.)

"Yes. I remember when the young lady brought the remittance in, called to my attention the remittance had been received, and I told her to hold it up because the transaction had not been completed, as far as we were concerned; there was no agreement; the assured had not consented or agreed to the retrospective basis on which the company was insisting, and so I felt that it was still an unsettled problem, and to my best recollection, I told her just to hold that temporarily." (Tr. pp. 338-339.)

This argument in justification of failure to deliver the policies places the indelible stamp of inconsistency and falsity upon the argument that third party defendant informed third party plaintiffs of the receipt of policies bearing a guaranteed rate of premium or that third party plaintiffs should have known that

such policies were in effect. In one breath, third party defendant argues that there were no effective policies and that it therefore violated no duty by failure to deliver the pieces of paper that it had received; and in the next breath argues that it placed third party plaintiffs on notice by informing them that there were effective policies and that it was holding them. As third party defendant admittedly did not believe that these policies were effective, the latter contention cannot be true.

If third party defendant was justified in failing to deliver the policies, for the reasons contended, then the plaintiff in this action is not entitled to recover. These policies were never effective. On the other hand, if these policies were effective, and plaintiff is entitled to recover, then there was a clear breach of duty on the part of third party defendant.

The lack of realization or belief on the part of third party defendant that these policies were effective is further demonstrated by the argument advanced in justification of failure to promptly notify third party plaintiffs of plaintiff's demand for additional premiums:

> "What defendants overlook is that *this is the first notice to third party defendant that plaintiff was definitely claiming payment at the $2.20 rate.* (Tr. p. 275.) Following receipt of this demand Mr. Cantlen for third party defendant engaged in discussions with plaintiff as to the validity of this claim, disputed the right of plaintiff to collect the same (Tr. pp. 276-277) and finally assisted in the

drafting of a letter to plaintiff over the signature of defendants, which letter is plaintiff's exhibit 18, declining payment of the invoices (Tr. pp. 278-279.)"

Third party defendant has no answer to the fact that it advised third party plaintiffs that pending negotiations for the renewal of insurance the binder would cover third party plaintiffs at the expiring policy rate of 1.223% of the gross receipts.

Third party defendant refers to a conflict of evidence upon this point. There is no such conflict. The only testimony given in respect to this matter was that of third party plaintiffs and it stands in the record unimpeached and uncontradicted. Third party defendant argues that the rate in the binder was left blank and that according to the provisions of the binder, the rate to be charged would be that of the renewal policy. According to third party defendant's written notification, the binder would remain in effect pending negotiations for renewal. The rate prevailing under the binder could only have been that of the former policy. Let us assume that there was no renewal insurance that supplanted the binder, and that the temporary coverage afforded by the binder had been cancelled either at the request of Fidelity or third party plaintiffs. What then would the premium rate under the binder have been? What could it have been but the old rate, which was paid and accepted during the period of negotiations? So long as third party plaintiffs did not accept any proffered policies, they had the right to

believe, as they did believe, that the old rate would remain in effect until an agreement was reached or the binder terminated.

THIRD PARTY PLAINTIFFS PROVED THEIR DAMAGE.

Third party defendant makes the claim that third party plaintiffs suffered no damage by its acts and that there is no proof that third plaintiffs could have placed the risk elsewhere at the former rate of $1.223. (T.P.D. B. p. 20.)

This claim of third party plaintiffs is devoid of merit. An agent cannot, with impunity, incur liability for its principals in violation of its express limitation of authority.

> "If an agent to purchase pays more than his principal authorizes him to pay, he is liable to the principal for any excess of the principal's funds so expended."

> *Western Union Telegraph Co. v. Chichuaua Exchange,* 206 S. W. 364;
>
> 3 C.J.S. 34.

Prima facie, the amount for which the agent has rendered the principal liable, over and above the amount authorized, is the amount of damage. The burden is on the agent to reduce the damages.

> *Sedgwick on Damages* (Ninth Edition) Vol. 3 Sec. 814.

Coughlin testified (Tr. pp. 417-418) that at the time of expiration of the old policy he could have placed the

risk elsewhere at the same rate. This evidence remains uncontradicted and undisputed. As soon as negotiations with Fidelity were terminated, appellants placed the insurance with the Transport Insurance Exchange. The rate was slightly higher than the rate at which the insurance could have been placed in September, 1946. There is not the slightest question, but that if appellants had been advised that they were, or were about to be, covered at a $2.20 rate of premium, they could and would have immediately placed the insurance with the Transport Insurance Exchange.

Even taking the rate at which the insurance was ultimately placed in December, 1946, and the loss experience of the appellants from September 1, 1946, to January 2, 1947, the premium would have been substantially less than that demanded by Fidelity. This is not the measure of damage, as at the time it became the duty of Bayly, Martin & Fay to disclose to appellants that further coverage by Fidelity would be at the rate of $2.20, the insurance could have been placed at the former rate. As stated, however, taking the loss experience from September 1, 1946, to January 21, 1947, and applying thereto the terms of the policy of Transport Insurance Exchange issued in December, 1946, the premium or cost of the insurance to appellants would have been substantially less than the amount of premium calculated at the $2.20 rate.

Under the primary policy accepted by appellants the earned premium was to be determined by the following formula:

1. Incurred losses and loss expenses, plus

2. Thirteen per cent (13%) of the premium paid for Home Office Overhead Expenses and contribution policyholders' surplus, plus

3. Taxes paid by the exchange, plus

4. The deficit if any, from previous accounting period or periods.

5. Commissions paid.

Since this would have been the original policy of appellants with the exchange and since it would have placed the same directly the last two factors would not apply to the determination of the premium in this instance. The known loss and loss expense for the period was $7800.00 (Tr. pp. 125-126.) Applying the 13% overhead and surplus factor the earned premium under the primary policy would have been $8814.00. To this would have to be added the tax assessed by the State of California against the gross premium. During the period in question this tax assessed at the rate of 2.4%. (Revenue Laws of California, Sec. 12256.) The total premium on the primary policy would therefore have been $9025.53. Fidelity is claiming a total primary premium of $15,081.64, for the same coverage and period. (Tr. p. 6.)

The excess coverage placed with the exchange was at the flat rate of $.30 per one hundred dollars of gross receipts. The total gross receipts of third party plaintiffs during this period were $746,615.81. (Exhibit 12.) The premium on this portion of the coverage would

ıave been $2314.51, making a combined total premium ɔf $11,340.04 as against a combined total premium of $16,972.12 claimed by Fidelity.

The damage to third party plaintiffs is clear.

CONCLUSION.

The brief against third party defendant has, of course, been written on the assumption that Policies 20968 and 20950, guaranteed premium policies, were offered and accepted, and became legally effective as of September 1, 1946. This, we earnestly contend, was not the fact. If the policies were accepted, again assuming that they were offered for acceptance, then the negligence and breaches of duty of the agent to its principal were indeed flagrant. If a liability exists from appellants to the plaintiff, then there exists a corresponding liability of third party defendant to appellants.

It is respectfully submitted that the judgment in favor of the appellee-plaintiff should be reversed. On the other hand, if it be held that plaintiff is entitled to judgment, then the judgment in favor of third party defendant should be reversed.

Dated, San Francisco, California,
March 30, 1951.

Respectfully submitted,
NORMAN A. EISNER,
Attorney for Appellants.